82-488

Office - Supreme Court, U.S.
FILED
SEP 20 1982
ALEXANDER L. STEVAS,
CLERK

Case No. _____

ALEXANDER L. STEVAS,
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1981

In Re: ALWIN E. HOPFMANN,

Petitioner

PETITION FOR WRIT OF HABEAS CORPUS TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION

Frederick A. Goldstein
Suite 200
2640 Hollywood Boulevard
Hollywood, Florida 33020
(305) 925-3358
Attorney of Record

Laurence A. Elgin
Suite 705
1000 16th Street, N.W.
Washington, D. C. 20036
(202) 857-0073

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO. _____

_____

In Re: ALWIN E. HOPFMANN,

Petitioner

_____

PETITION FOR WRIT OF HABEAS CORPUS
TO THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

_____

QUESTIONS PRESENTED

1. Whether an adequate remedy is available to petitioner in a lower Federal court.

2. Whether petitioner has any remedy available in the State courts.

3. Whether this Court should exercise its discretion to grant the writ.

4. Whether grounds exist for concluding that petitioner is unlawfully confined and his freedoms are interfered with.

5. Can a state political party confine an individual, as that term has been used by this Court, so as to deprive him of his liberty, as guaranteed by the Constitution of the United States, to be nominated for public office in accordance with the prescription of his state's legislature, prescribed by the people's elected representatives under the

authority delegated by Article I, Section 4, Clause 1 of the Constitution.

6. Once a state legislature has prescribed, pursuant to the authority delegated to it by Article I, Section 4, Clause 1, of the Constitution of the United States, can the justices of a state's highest court and the officials of the executive branch of that state's government, in the person of the Secretary of State of the State and, under him, and in his Office the Commissioner of Elections of the State, acting under color of their authority as officials of that state, ignore that constitutionally mandated prescription.

7. Whether petitioner should be released forthwith from the confinement in which he has been placed and the interference with his freedom ordered to cease.

TABLE OF CONTENTS

		Page No.
	Table of Authorities	ii
I.	Jurisdiction	1
II.	Questions Presented	1
III.	Constitutional Provisions and Statutes Involved	4
	A. Constitutional Provisions	4
	B. Statutes and Bills	7
	C. Other Authority	7
IV.	Statement	9
V.	Substantiality of the Questions Presented	14
VI.	Reasons Relied on for Allowance of Writ	18
	A. Plaintiff Hopfmann Qualified to be a Candidate for Nomination	18
	B. Interference with Freedom	21
	C. The Constitutional Mandate	27
	D. Other Constitutional Privileges Violated	32
	E. Argument	36
VII.	Conclusion	49

TABLE OF AUTHORITIES

	Page No.
Constitution of the United States	
Article I, Section 3, Clause 3	19
Article I, Section 4, Clause 1	24,29
Article I, Section 4, Clause 3	1,3,4,9,11, 19,20,50
Article I, Section 5, Clause 1	5,29
Article IV, Section 2, Clause 2	5,32
Article VI, Section 2, Clause 2	6,34
Amendment I	6A
Amendment V	6A
Amendment IX	5,33
Amendment X	5,33
Amendment XII	35
Amendment XIII, Section 1	7,44
Amendment XIV, Section 1	6,31
Amendment XVII, Clauses 1 and 2	4,19,29,33

STATUTES AND BILLS

	Page No.
28 U.S.C. 2241(a)	1,9
Massachusetts Code of General Laws, Volume 50-55A, Chapter 53 §§1-10, 44,45,48,48A.	1,9 7,20,30
Massachusetts House Bill No. 5852.	7,22,30

CASES

	Page No.
Bradon v. 30th Judicial Circuit Court/Ky.,410 U.S. 484 (1973)	39
Brown v. Allen, 344 U.S. 443 (1953)	39
Carafas v. LaValle, 391 U.S. 234 (1968)	40
Fay v. Noia, 372 U.S. 391 (1965)	39
Chin Yow v. United States, 208 U.S. 8 (1908)	37
Flores v. United States, 524 F. 2d 627 (9 Cir. 1975)	40
Frank v. Mangum, 237 U.S. 309 (1915)	38
Harris v. Nelson, 394 U.S. 286 (1961)	38,39,40
Hensley v. Municipal Court, 411 U.S. 345 (1973)	38
Hurtado v. California, 110 U.S. 516, (1884)	48,49
Jones v. Cunningham, 371 U.S. 236 (1963)	38,40
Kusper v. Pontikes, 414 U.S. 51, 38 L.Ed. 2d 260, 94 S.Ct. 303 ( )	37

	Page No.
Lieggi v. United States, 389 F.E. 12 (N.D.Ill. 1975)	40
McPherson v. Blacker, 146 U.S. L (1892)	45
Nguyen Da Yen v. Kissenger, 528 F.2d 1194 (9 Cir.1975)	40
Peyton v. Rowe, 391 U.S. 54 (1968)	39,40
Richardson v. Ramirez, 418 U.S. 24 (1974)	46
Slaughter-House Cases, 16 Wall. 36, (1873)	41,42
Strait v. Laird, 406 U.S. 341 (1972)	39,40
Townsend v. Sain, 372 U.S. 293 (1963)	39
United States v. Gradwell, et al. 243 U.S. 476, 484, 61 L.Ed. 857, 37 S.Ct. 407 (1917)	27

PETITION FOR WRIT OF HABEAS CORPUS

ALWIN E. HOPFMANN, petitioner herein appearing by Frederick A. Goldstein and Laurence A. Elgin, his attorneys, petitions this Court to issue a Writ of Habeas Corpus, and shows as follows:

I. JURISDICTION

Jurisdiction to grant the Writ of Habeas Corpus sought by petitioner herein is conferred on this Court by the Constitution of the United States of America, Article I, Section 9, Clause 2, which ratifies and affirms the existence of the privilege of the writ as it existed then and now in the Common Law and upon 28 USC 2241(a), as well, but not in derogation of the Common Law and Constitutional right.

II. QUESTIONS PRESENTED

1. Whether an adequate remedy is

available to petitioner in a lower Federal court.

2. Whether petitioner has any remedy available in the State courts.

3. Whether this Court should exercise its discretion to grant the writ.

4. Whether grounds exist for concluding that petitioner is unlawfully confined and his freedoms are interfered with.

5. Can a state political party confine an individual, as that term has been used by this Court, so as to deprive him of his liberty, as guaranteed by the Constitution of the United States, to be nominated for public office in accordance with the prescription of his state's legislature, prescribed by the people's elected representatives under the

authority delegated by Article I, Section 4, Clause 1 of the Constitution.

6. Once a state legislature has prescribed, pursuant to the authority delegated to it by Article I, Section 4, Clause 1, of the Constitution of the United States, can the justices of a state's highest court and the officials of the executive branch of that state's government, in the person of the Secretary of State of the State and, under him, and in his Office, the Commissioner of Elections of the State, acting under color of their authority as officials of that state, ignore that constitutionally mandated prescription.

7. Whether petitioner should be released forthwith from the confinement in which he has been placed and the interference with his freedom ordered to

cease.

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. CONSTITUTIONAL PROVISIONS

1. Article I, Section 4, Clause 1:

> "The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of Chusing Senators."

2. Amendment XVII, Clauses 1 and 2:

> "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years ... . When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies; Provided, That the

legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."

3. Article I, Section 5,

Clause 1:

"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, ..."

4. Article IV, Section 2,

Clause 2:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

5. Amendment IX:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

6. Amendment X:

"The powers not delegated to the United States by

the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

7. Article VI, Clause 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

8. Amendment XIV, Section 1:

"No State shall ... enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of ... liberty ... without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

9. Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

10. Amentment V:

"No person shall be ... deprived of ... liberty... without the due process of law; ... ."

11. Amendment XIII, Section 1:

> "Neither ... nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

B. OPINION OF THE JUSTICES

1. Unpublished advisory opinion of the Supreme Judicial Court of Massachusetts entitled "Opinion of the Justices to the Governor," dated April 23, 1982.

> "... General laws c. 53, §44, as amended through St. 1981, c.278, § 1, provides in part that "(t)he nomination of candidates for nomination at State primaries shall be by nomination papers." There is pending before the Governor for his approval House Bill No. 5852, which would amend c. 53, §44 by inserting after the first sentence the following sentence: 'Notwithstanding the charter, rule or by-law of a political party, any candidate, who is enrolled in such political party,

submitting nomination papers subject to the provisions of this chapter shall be a candidate for nomination at the state primary.' Article Six, Section III, of the charter of the Democratic party of the Commonwealth of Massachusetts, provides 'There shall be a State Convention in even numbered years for the purpose of endorsing candidates for statewide offices in those years in which such office is to be filled. Endorsements for statewide office of enrolled Democrats nominated at the Convention shall be by majority vote of the delegates present and voting, with the proviso that any nominee who receives at least 15 percent of the Convention vote on any ballot for a particular office may challenge the Convention endorsement in a State Primary Election... If house No. 5852 were approved, G.L.c. 53, § 44, as thereby amended, would abridge the constitutional rights of the Democratic party and its members to associate by allowing candidates to be placed on the Democratic State primary ballot in contravention of the party's charter."

IV. STATEMENT OF THE CASE

1. This petition is filed pursuant to the authority of the Common Law as ratified and incorporated by the reference of Article I, Section 9, of the Constitution of the United States, and as extended to the jurisdiction of this Court by the provisions of section 2241(a) of Title 28 of the United States Code, to obtain petitioner's release from the confinement, as defined by this Court in Kusper v. Pontikes, 414 U.S. 51, 38 L. Ed. 2d 260, 94 S.Ct. 303, and the interference with his freedoms imposed upon him by the Democratic State Committee of Massachusetts under the chairmanship of Chester G. Atkins.

2. Petitioner was confined from his freedom and his freedom interfered with by the opinion of the justices of the

Supreme Judicial Court of Massachusetts on April 23, 1982, which gave that confinement and interference with petitioner's freedom the force and color of law, namely: Edward F. Hennessey, Herbert P. Wilkins, Paul J. Liacos, Ruth I. Abrams, Joseph Nolan, Neil Lynch, and Francis O'Connor. The opinion is reproduced in the Appendix.

3. The execution of this confinement was carried out by Michael Joseph Connolly, the Secretary of State of Massachusetts and Marcia Molay, the Director of Elections in the Office of the Secretary of State of Massachusetts, who participated in the confinement and interference with the freedom of the petitioner by refusing to place his name on the primary ballot.

4. Petitioner has not applied to the District Court for issuance of a Writ of Habeas Corpus because preliminary relief, which would have granted equivalent relief at the time it was requested, was denied by the District Court in question. This was in the parallel case below of HOPFMANN, et al. v. CONNOLLY, et al., in the United States District Court for the District of Massachusetts, Case No. 82-1530-MC. In that case, the court not only denied equivalent preliminary relief but avoided the basic constitutional issues raised in the petition and, in particular, the clear mandate of Article I, Section 4, Clause 1, which was urged upon that court at that time and which so clearly makes the confinement and interference complained of unconstitutional.

The court below has thus evidenced a determination to delay addressing the central issue raised in this petition until such time as relief may be difficult or perhaps even impossible to obtain.

5. Since the highest court of the State, acting through the justices thereof, rendered the opinion which gave the confinement and interference with freedom complained of the color and effect of law and in that opinion stated that the Democratic Party of Massachusetts had a Constitutional right under the First Amendment to the Constitution of the United States to exclude candidates from the primary ballot who had not received the newly-required fifteen percent (15%) of the pre-primary convention vote, it would be futile for petitioner to attempt a remedy in the courts of Massachusetts.

6. Changing the rules in the middle of the game, the State Democratic Party, in this instance, unconstitutionally eliminated petitioner from the primary race and blocked him from running on any ticket. The party thus confined him and interfered with his freedom to run under the laws prescribed by the legislature of Massachusetts under the mandate of the United States Constitution. This was done by the party in concert with the Supreme Judicial Court Justices and the Secretary of State and Director of Elections in a manner which was beyond their authority as determined by the United States Constitution and the law prescribed by the legislature and these acts should be rendered void and of no effect.

If extraordinary relief is not granted so that petitioner may then take

further action to compel the state authorities either (a) to hold a special primary to restore his freedom to run in accordance with the Constitution, or (b) to place his name on the general election ballot and compel a special run-off election, then his freedom cannot be restored and his unconstitutional confinement will have been successfully carried out in defiance of the Constitution of the United States.

V. SUBSTANTIALITY OF THE QUESTIONS PRESENTED

It is no exaggeration to say that this confinment of the petitioner by his state democratic party as aided, abetted, executed and carried out by the justices of the highest court of his state and the Secretary of State and, under him, the Director of Elections, poses the most

serious threat to petitioner and to all of those situated like him, who wish to run for political office as a member of a political party free of unconstitutional and illegal control by party "bosses" and free of the taint of "machine politics" to the extent that those terms connote the very sort of thing that happened in this instance. If the freedom and liberties of the individual who wishes to participate in party politics can be interfered with in this fashion, then the primary system as we know it, with free and open access to the ballot for those who qualify under the constitutionally mandated prescription of their state legislature, would be destroyed by the encroachment of total party control. The people would no longer choose their elected representatives; unelected party

bosses would tell them what control they would have. Truly, this would lead to a return to the bad old days of "King Caucus" and would be the harbinger of a "corporate state."

If the justices of a state's highest court and officials of the executive branch can ignore the clear language of the Constitution governing elections to the United States Senate, which here was not even discussed, and seize upon such a flimsy pretext to assist a "favorite son" in illegally locking competing candidates off the ballot, then all individuals such as ALWIN E. HOPFMANN may illegally be confined within their major political party at the cost of being compelled to give up their cherished liberty as guaranteed by the Constitution of the United States as the price of

effective participation in the political process.

Surely the makers of the Constitution intended to establish a bulwark against this very thing in providing, in every instance, that the elected representatives of the people should prescribe these matters - the state legislatures with Congress looking over their shoulders - except in the very temporary situation where a writ of election has to be used to fill a vacancy. So then, should not justices of a state's highest court, the officials of its executive branch and the chairman of one of our leading state's dominant political parties, intend to further establish these bulwarks against deprivation of these fundamental freedoms, not tear them down?

The questions presented here will determine the path which our political system will take at this fork in the road for our Republic. Will individuals such as petitioner be confined within the machinery of major parties, with their huge "war chests" and their command of the complex machinery of modern mass media, and be compelled to give up their constitutionally guaranteed freedom and liberty, or will the individual be allowed to continue in the exercise of that freedom which the makers of our Constitution intended him to have?

VI. REASONS RELIED ON FOR ALLOWANCE OF WRIT

A. PLAINTIFF HOPFMANN QUALIFIED TO BE A CANDIDATE FOR NOMINATION

1. Petitioner HOPFMANN is a lifelong citizen and inhabitant of Massa-

chusetts who has attained an age of more than thirty years as required by the United States Constitution, Article I, Section 3, Clause 3.

2. The Constitution of the United States provides that Senators from each state shall be "elected by the people thereof," Amendment XVII, Clause 1, except that when vacancies occur, a state legislature may empower the executive of the state to make a temporary appointment to fill the vacancy until the people shall elect a replacement pursuant to a writ of election, a situation which is not at this time relevant in this cause.

3. The Constitution further provides that the "Times, Places and Manner of holding Elections," for Senators, "shall be prescribed in each State by the Legislature thereof; ... ." Only Congress

itself may, "make or alter such Regulations, except as to the Place of Chusing Senators." Article I, Section 4, Clause 1.

4. The legislature of Massachusetts, pursuant to this Constitutional mandate, has so prescribed in the Massachusetts Code (G.L.C. 53, Section 44) the requirements for becoming a nominee in a party primary. They are:

a) The candidate must not have been enrolled in a political party (other than the one whose nomination he was seeking) for a period of one year prior to the filing date.
b) The candidate must have filed a certified petition with the names of 10,000 registered Massachusetts voters, voters who were either registered in the party whose nomination the candidate was seeking or, in the alternative, were not enrolled in any party.
c) The candidate had filed a

written acceptance of candidacy.

d) The candidate had filed a certification from the Registrar of the town or city of his residence that he had been an enrolled member of the party in which he had run for at least 90 days.

Petitioner HOPFMANN has met all the requirements.

B. INTERFERENCE WITH FREEDOM

5. In 1981 the State Democratic Party propounded a "charter" of the party which provided for a pre-primary convention to be held in May of each election year. Previously such conventions had been held from time to time for the purpose of endorsing candidates but such endorsements had not affected access by candidates to the primary ballot. In the Charter it was propounded for the first time that at the pre-primary convention

in May, in addition to the party endorsement, there would be a proviso that any candidate receiving at least fifteen percent (15%) of the votes of the delegates to the convention "may challenge the Convention endorsement" at the State Primary Election.

6. The State Democratic Party attempted without success to get the Massachusetts legislature to prescribe nomination procedures in accord with this Charter provision. Instead, the legislature passed a bill, House No. 5852, which sought to clarify the existing statutes even further to make it clear that:

> "--Notwithstanding any party charter, rule or by-law, any candidate submitting nomination papers pursuant to this chapter shall be a candidate for nomination at the state primary." (emphasis added).

7. The governor of Massachusetts, apparently feeling that no such clarification was even needed, submitted the bill to the justices of the state's highest court, the Supreme Judicial Court of Massachusetts for an advisory opinion under a statutory procedure, asking two questions, as set out by the justices in their opinion. They were, essentially, (a) did the new bill supercede the existing law, and (b) would enactment of the bill allow ballot access to the democratic primary ticket by the existing statutory route of filing nomination papers regardless of the new fifteen percent (15%) rule in the party charter.

8. The justices of the Massachusetts court, in an advisory opinion dated April 23, 1982, declined to answer

the first question and answered 'yes' to the second, but took the opportunity to announce that, in their opinion, the democratic party's newly adopted fifteen percent (15%) rule was the exclusive way for a democratic candidate to get access to the ballot and that to hold otherwise was unconstitutional because it violated the freedom of association which has been developed by the courts as a concomitant of the First Amendment.

9. The advisory opinion never mentioned any of the constitutional provisions listed in this petition, particularly Article I, Section 4, Clause 1, and so did not interpret the Constitution of the United States but rather selectively seized upon an extension of First Amendment rights to use as a justification for interfering with the constitu-

tionally mandated prescription of the state legislature, thus exceeding the powers and jurisdiction of the Supreme Judicial Court.

10. Not quite a month later, on May 21, 1982, the state democratic party met in pre-primary convention for two days. At the start of the pre-primary convention the party officially adopted the "15% Rule" propounded earlier in the party charter. By this time it was too late under Massachusetts statutes for petitioner to run as an independent, even had he wished to do so.

11. On May 25, 1982, Chester Atkins, Chairman of the Democratic State Committee, informed Michael Joseph Connolly, the Secretary of State of Massachusetts, of those candidates who had been endorsed by the democratic party

pre-primary convention, or who had met the 15% rule by getting that percentage of the convention vote. Petitioner's name was not included.

12. Petitioner was at the democratic pre-primary convention and received approximately two percent (2%) of the vote for the nomination for United States Senator.

13. On May 28, 1982, petitioner filed the necessary nomination papers required by Massachusetts law and received a receipt therefor.

14. On May 28, 1982, Michael Joseph Connolly's Office, through the Director of Elections, Marcia Molay, informed petitioner that his name would not be placed on the ballot for the statewide primary on September 14, 1982, relying on the Advisory Opinion of April 23, 1982,

and the newly adopted 15% rule of the democratic party charter.

C. THE CONSTITUTIONAL MANDATE

15. This case involves no "state law" as that term is regularly used in legal opinions. Rather, it involves that power to "prescribe" the times, places and manner of holding elections for the United States Congress which was delegated to the legislatures of the states by the founders of the Republic. We refer this Court to the reply, quoted by this Court in United States v. Gradwell, et al., 243 U.S. 476, 484, 61 L. Ed. 857, 37 S.Ct. 407 (1917), which James Madison made to James Monroe in the debates in the Virginia Convention:

> "It was found impossible to fix the time, place, and manner, of election of representatives in the constitution. It was found

> necessary to leave the regulation of these, in the first place, to the state governments, as being best acquainted with the situation of the people, subject to the control of the general government, in order to enable it to produce uniformity, and prevent its own dissolution. . . . Were they exclusively under the control of the state governments, the general government might easily be dissolved. But if they be regulated properly by the state legislatures, the congressional control will very probably never be exercised. The power appears to me satisfactory, and as unlikely to be abused as any part of the constitution." Records of the Federal Convention, Farrand, vol. 3. p. 311.

Note that the proper regulation by state legislatures of the time, place and manner of Congressional elections was sought, with no thought of any body other than Congress itself interfering with that proper regulation.

16. This constitutional mandate was further reinforced by the passage and adoption of the Seventeenth Amendment. This amendment made it clear that the Senators of each state should thenceforth be elected by the "people thereof." Further, even in the case of a vacancy occurring, appointments could only be made temporarily, as empowered by the legislature of each state, until the vacancy could be filled by special election.

17. The second half of Article I, Section 4, Clause 1, makes it clear that Congress, and only Congress, may "make or alter" such regulations prescribing the time, places and manner of electing Senators to Congress. Even the judiciary is ousted from its normal role in this regard by Article I, Section 5, which provides that each House of Congress

"shall be the Judge of the Elections, Returns and Qualifications of its own Members."

18. In the petitioner's case, then, the Supreme Judicial Court of Massachusetts had no authority to interfere with the prescription of the laws of Massachusetts as passed by the legislature and contained in Chapter 53 of the Massachusetts Code of General Laws, or as contained in the Bill House No. 5852 of 1982. Yet that is what it did. Nor did it have any authority to judge an election for United States Senator or the qualifications of candidates, except in accordance with the prescription of the legislature.

19. Nor is there a question here of the authority of courts to interpret the Constitution. For here there was no interpretation. All portions of the

Constitution other than the imaginary First Amendment right which the justices used as a pretext were ignored. None of the Constitutional provisions which directly deal with this area of the law were even cited. In fact, no actual constitutional passages were cited at all.

20. Ironically, the court seized upon the very case in which this Court decided that political parties could not "confine" individuals in political parties, Kusper v. Pontikes, supra, and tried to use the "freedom of association"doctrine to justify the Massachusetts democratic party's confining those such as petitioner from their freedom to be in a political party without sacrificing their constitutional rights.

21. The notion that "freedom of association" embraces a "right" by

which a political party may compel its adherents to give up their right to run for Congressional office in accordance with the prescription of their state's legislature, is surely a unique one in the annals of Constitutional jurisprudence. But it is not the blatantly erroneous misinterpretation that is at issue here, but the fact that the Supreme Judicial Court assumed authority and jurisdiction it did not have.

D. OTHER CONSTITUTIONAL PRIVILEGES VIOLATED

22. Other constitutionally guaranteed freedoms of the petitioner have been violated here by this imposed confinement of petitioner.

23. Article IV, Section 2, Clause 2, referring to Constitutional Privileges and Immunities, mandates that

the citizens of each state shall be entitled to the Privileges and Immunities of the Citizens in each state. Massachusetts cannot, therefore, have its democratic party, courts and Secretary of State impose this 15% rule.

24. The Ninth Amendment has also been violated. The Constitution, as amended by the Seventeenth Amendment, leaves the right to nominate United States Senators in the people, not in the party bosses and their conventions.

25. The Tenth Amendment is violated. Since the power to set the time, place and manner of choosing Senators has been specifically delegated to state legislatures, subject to Congress' own power to alter, amend and (through the appropriate House) to judge, it has been prohibited to the states to the extent it is not

so delegated or delegated to the United States. Any other powers are reserved to the people, not to political parties.

26. Article VI, Clause 2. The Constitution is supreme. The "Judges in every state shall be bound thereby." They are not free, as was done here, to ignore the Constitution and its clear mandate, the advisory opinion law of Massachussetts notwithstanding.

27. Amendments V and XIV. Here petitioner has been deprived of a fundamental liberty, that of running for nomination to elective office in accord with the prescription of the state legislature without due process of law. He has been deprived of equal protection since the 15% rule is imposed by a single party on its own accord. If he were a

Republican, he could have been on the September 14, 1982 primary ballot.

28. Amendment XII. The Massachusetts democratic party has imposed upon petitioner a form of involuntary servitude.

29. The 15% rule has never been enacted by the Massachusetts legislature, and is therefore solely a creature of the State Democratic Party.

30. Petitioner filed suit in the United States District Court for the District of Massachusetts (Case No. 82-1530-MC) seeking injunctive relief and mandamus, founded on violations of the Voting Rights Act.

31. On July 7, 1982, an order was entered denying injunctive relief.

32. Applications for stay were then presented to this Honorable Court

(Case No. A-18) and such relief was denied on July 9, 1982.

E. ARGUMENT

33. The relief sought by a Petition for Writ of Habeas Corpus has its underpinnings in the very fabric of our Country's fiber. The Great Writ, as it is often called, protects all citizens of the United States from unlawful custody or confinement resulting from laws of this Nation or actions which infringe on the fundamental rights over a citizen's life, liberty or property. The type of custody or confinement is not only literal, consisting of mortar and stone, but includes those restraints which contravene and do violence to the various constitutional provisions.

34. This Court has defined confinement as:

> "To 'lock' the voter into his pre-existing party affiliation for an extended period of time following participation in any primary election and each succeeding primary vote extends this period of confinement." Kusper v. Pontikes, supra.

35. This Court, in Chin Yow v. United States, 208 U.S. 8 (1908), had the opportunity to consider the motion for custody for purposes of habeas corpus relief. Justice Holmes, while delivering the opinion of this Court indicated physical custody is not required. Equally important, Justice Holmes implies that until the matter is resolved on the merits, there seems to be no other effective manner in which to treat the situation. This

is the exact circumstance in the case at bar.

This underlying thread concerning custody as something not alien to actual restraint has been followed by this Court in Hensley v. Municipal Court, 411 U.S. 345, 349 (1973) which stated, while citing Jones v. Cunningham, 371 U.S. 236 (1963):

> "While the 'rhetoric celebrating habeas corpus has changed little over the centuries" it is nevertheless true that the functions of the writ have undergone dramatic change. Our recent decisions have reasoned from the premise that habeas corpus is not 'a static, narrow, formalistic remedy," Jones v. Cunningham, supra at 243, but one which must retain the "ability to cut through barriers of form and procedural mazes." Harris v. Nelson, 394 U.S. 286, 291 (1969). See Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). "The very

nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." Harris v. Nelson, supra, at 291.

"Thus we have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements. The demand for speed, flexibility, and simplicity is clearly evident in our decisions concerning the exhaustion doctrine, Fay v. Noia, 372 U.S. 391 (1965); Brown v. Allen, 344 U.S. 443 (1953); the criteria for relitigation of factual questions, Townsend v. Sain, 372 U.S. 293 (1963); the prematurity doctrine, Peyton v. Rowe, 391 U.S. 54 (1968); the choice of forum, Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484 (1973); Strait v. Laird, 406 U.S.

> 341 (1972); and the procedural requirements of a habeas corpus hearing, Harris v. Nelson, supra. That same theme has indelibly marked our construction of the statute's custody requirement. See Strait v. Laird, supra; Payton v. Rowe, supra; Carafas v. LaVallee, 391 U.S. 234, (1968); Walker v. Wainwright, 390 U.S. 335 (1968); Jones v. Cunningham, supra."

Other courts have recognized jurisdiction for purposes of habeas corpus in non-custodial situations. Nguyen Da Yen v. Kissinger, 528 F. 21 1194 (9 Cir. 1975) (minor child); Lieggi v. United States, 389 F.E. 12 (N.D. Ill. 1975) (aliens); Flores v. United States, 524 F. 2d 627 (9 Cir. 1975) (deportation order which was automatic at expiration of period allowed for voluntary departure).

36. Clearly and unquestionably each citizen has the right to petition

for a Writ of Habeas Corpus.

> "... The right to peaceably assemble and petition for redress of grievances, the privilege of the Writ of Habeas Corpus, are rights of the citizen guaranteed by the Federal Constitution ..." Slaughter-House Cases, 16 Wall. 36, 79 (1873).

37. In fact, a citizen can demand the full protection of the Federal Government:

> "... Another privilege of a Citizen of the United States is to demand the care and protection of the Federal Government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government ..." Slaughter-House Cases, supra, at p.79.

38. It has long been recognized that there is a distinction between citizenship of the states and citizenship of the United States by the definition of

privileges. The privileges and immunities of citizens of the states embrace generally those fundamental civil rights for the security and establishment of which organized society was instituted, and which remain, with certain exceptions mentioned in the Federal Constitution, under the care of the state governments. On the other hand, the privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the national government, the provisions of its constitution, or its laws and treaties made in pursuance thereof; and that it is the latter which are placed under the protection of Congress by the second clause of the Fourteenth Amendment. See Slaughter-House Cases, supra, pps. 73-79.

39. In the case at bar, petitioner has been and continues to this very moment to be subjected to unlawful custody and confinement by virtue of the action taken by the Supreme Judicial Court, the Secretary of State and the State Democratic Party of the Commonwealth of Massachusetts. Life has been given to a provision which does not appear in the General Laws of Massachusetts or for that matter in the Laws of Congress. The Massachusetts Legislature has never passed the requirement of 15%, yet this rule is the single reason petitioner's name does not appear on the ballot. In essence, the State Democratic Party has become the super-legislature for the Commonwealth of Massachusetts. All the people of Massachusetts did not elect these delegates, yet this unelected body is permitted to act unlawfully and

with impunity. This rule is clearly arbitrary, capricious and bears no relationship to any legitimate state purpose. The only purpose is to hinder a citizen from seeking the approval of the electorate. This it has accomplished so far. Petitioner, ALWIN E. HOPFMANN, has had his rights wrenched from him and unless this Court acts decisively and enters an order compelling the appropriate officials to place his name on the ballot, this Court will further sanction these repugnant actions. As Justice Field stated, in regard to the Thirteenth Amendment, this amendment forbids, not merely the slavery heretofore known to our laws, but all kinds of involuntary servitude not imposed in punishment for a public offense.

40. The issues presented herein are basic, fundamental and essential to our

notions of due process. The will of the people has not been adhered to, yet the will of a few has taken steel fisted control. This has never been condoned, nor should this approach ever be, much less sanctioned in this Nation:

> "... A State, in th ordinary sense of the Constitution ... is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the Governed ..." McPherson v. Blacker, 146 U.S. 1(1892)

41. This Court should always keep in the forefront the possibility that a state or political party:

> "... may disenfranchise a class of voters to withdraw all political influence from those who are practically hostile to the existing order, strikes at the very heart

> of the democratic process. A temporal majority could use such a power to preserve inviolate its view of the social order simply by disenfranchising those with different views ..." Richardson v. Ramirez, 418 U.S. 24 (1974).

42. There can be little doubt that the lives of the citizens of this Nation are deeply affected and changed by the decisions of government. Richardson, supra, at p. 78. Furthermore, there is no doubt the opinion of the lower tribunal and the actions of certain officials in the present case are tantamount to a law within the parameters and definitions expressed by this Court:

> "... It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in

the language of Mr. Webster, in his familiar definition, "the general law a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," so "that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society," and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the person and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations im-

> posed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well as against the powers of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government. Hurtado v. California, 110 U.S. 516, 536 (1884)

42. Since the lower tribunal entered an order and the state court rendered an opinion which unlawfully deprives the petitioner of his constitutional rights, he has the right to have his rights pro-

tected and:

> "... It follows that any legal proceeding enforced by public authority, whether sanctioned by age or custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserved these principles of liberty and justice, must be held to be due process of law. Hurtado, supra, at p. 537.

43. It should be clear from the facts of this case, that in the event this writ is not issued, the primary system as we now know it in this Nation will be abolished. The result will be that political parties will have iron clad and absolute control of the political process in this Country.

VII. CONCLUSION

It is abundantly and painfully clear that the petitioner, ALWIN E. HOPFMANN,

has complied with all the requirements to run in a 1982 Democratic Primary for the United States Senate for Massachusetts as defined by the laws of the United States and the Commonwealth of Massachusetts. He is a Federal candidate and the State of Massachusetts has unlawfully kept his name from the voters because of a 15% requirement that simply does not exist in recognized state law. As indicated previously, Article I, Section 4 of the United States Constitution prescribes that state law controls criteria for access to the ballot for Senator. Since the lower tribunals have, by action or inaction, sanctioned this unlawful action and refused to grant timely relief, the only remedy is here, before this Honorable Court. The lower tribunals' actions have confined and placed the petitioner in

custody in such a way as to deprive him of his constitutional rights as outlined.

WHEREFORE, petitioner prays as follows:

1. That this Court issue a Writ of Habeas Corpus, directed to Chester G. Atkins, Chairman of the State Democratic Committee of Massachusetts, and all other appropriate parties, directing them to produce the petitioner before this Court.

2. That this Court hold a hearing to determine the issues presented by this petition.

3. That this Court grant this petition and release the petitioner from unlawful confinement and order the appropriate officials of Massachusetts to nullify the election of September 14, 1982, wherein petitioner was unconstitutionally and illegally confined from having his

name placed on the ballot and declare the same to be void and of no effect.

4. That this Court order a special election to be held in which petitioner's freedom will be restored.

5. That this Court order that the petitioner be released from the custody or confinement of the Federal Order and the state advisory opinion issued by the lower tribunals and order the appropriate officials to place petitioner's name on a special ballot and order that a special election be held on October 5, 1982 or at such time thereafter as the Court may direct, and that petitioner's name be placed on the ballot on the Democratic ticket for the office of United States Senator.

VERIFICATION

District of Columbia)
City of Washington)

FREDERICK A. GOLDSTEIN, being duly sworn, deposes and says that he is one of the attorneys for ALWIN E. HOPFMANN, that he has prepared the petition, and read the same; and that the statements contained therein are true and correct, except as to matters on information and belief, and as to them he believes them to be true.

Frederick A. Goldstein

Subscribed and sworn to before me this 16th day of September, 1982.

NOTARY PUBLIC

My commission expires: November 30, 1986

Respectfully submitted,

ATTORNEYS FOR ALWIN E. HOPFMANN

Frederick A. Goldstein
2640 Hollywood Blvd.
Suite 200
Hollywood, Florida 33020
(305) 925-3358

Laurence A. Elgin
1000 16th Street, N.W.
Suite 705
Washington, D.C. 20036
(202) 857-0073
A Member of the Bar of
the District of Columbia
Court of Appeals.